No. 91-1049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES H. RUCKER, ET AL.,
Petitioners,

v.

HARFORD COUNTY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the court below err in holding that under the Fourth Amendment a claim of unreasonable seizure is available to a fleeing criminal who is shot by the police while an innocent bystander shot by a stray bullet under the same circumstances has no Fourth Amendment redress?

B. Assuming that an innocent bystander who is shot by the police may not invoke the Fourth Amendment, did the court below err in holding that such conduct is actionable under the Fourteenth Amendment only if it shocks the conscience even though a fleeing criminal shot under the same circumstances can recover if the police conduct is objectively unreasonable?

PARTIES TO THE PROCEEDING

The plaintiffs in the district court and the petitioners here are David W. Rucker and his father, guardian and next friend, James H. Rucker. The defendants below and respondents here are Harford County, Dominic J. Mele, Sheriff of Harford County, Deputy Sheriffs Gary L. Vernon, Jr., Ricky F. Williams, Stephen E. Bodway, David B. Alexander, Elmer H. Tippitt, Superintendent of the Maryland State Police, John J. O'Neal, former Superintendent, and State Trooper James L. Gruver.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

JAMES H. RUCKER, *et al.*,

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Respondents.

Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioners, James H. Rucker and David W. Rucker, respectfully pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 946 F.2d 278 (4th Cir. 1991) and is reprinted in the Appendix at pages 1a to 16a. The unreported opinion and order of the United States District Court for the District of Maryland is reprinted in the Appendix at pages 18a to 26a.

JURISDICTION

The Court of Appeals issued its judgment and opinion on October 3, 1991. The jurisdiction of this Court rests on 28 U.S.C. Section 1254.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Section 1 of the Fourteenth Amendment of the United States Constitution provides as follows:

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Ku Klux Klan Act, 42 U.S.C. Sec. 1983 (1979). Fed. R. Civ. P. 55 is reproduced in the Appendix to this Petition at page 27a.

STATEMENT OF THE CASE

A. The Facts

On the evening of July 28, 1987, in violation of the mandates of *Tennessee v. Garner*, 471 U.S. 1 (1985), four police officers fired twenty rounds of ammunition at Jerry Mace, an unarmed fleeing automobile driver who appeared to be under the influence of alcohol.[1] The officers missed Mace, but one of their bullets struck the Petitioner, David Rucker, a 16 year-old bystander, above his left eye, exiting above his left ear. As a result, David Rucker lost part of the left front lobe of his brain rendering him permanently mentally and physically disabled.

The events leading up to this tragedy began the afternoon of July 28, 1987, when Jerry Mace took a vehicle without permission from a friend's driveway in northern Harford County, Maryland. Mace drove south on In-

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[1] After all of the relevant events of the evening had concluded, the police learned that Mace was under the influence of crack cocaine. However, their observations at the time of this incident simply led them to the conclusion that he was driving while under the influence of alcohol.

terstate 95 and failed to pay $1.00 at a toll facility. A high speed pursuit by the Maryland State Police ensued with Mace driving erratically. Mace, however, neither injured nor struck anyone.

Within minutes, the police discovered Mace's identity, home address and general description were dispatched to Mace's home, which was a short distance from the area of the pursuit, to await his arrival.

Several Harford County Deputy Sheriffs joined in the chase. Mace eventually drove his vehicle into a cornfield at Mr. Heine's farm. State Troopers Gruver and Conoway, already in pursuit, and Harford County Deputy Sheriffs David Alexander, Ricky Williams and Stephen Bodway arrived at the cornfield.

Harford County Deputy Sheriff Gary Vernon also joined the action at the cornfield. Deputy Vernon, who was off shift but in accordance with County policy operating a police vehicle, brought with him a 14 year-old girl, Shelly Godfrey, the Vernons' intended babysitter for the evening.

The police had only blocked one end of Trimble Road, which bordered the cornfield on one side, so civilians travelling from the other direction parked and left their vehicles. A small group of civilians formed at the bottom of the driveway entrance to the farm which served as a second border to the cornfield. Included within that group

was 16 year old petitioner, David Rucker. David Rucker and the others were advised by Deputy Vernon to leave the driveway and they did, proceeding directly across Trimble Road from the driveway up an embankment and into another field. David Rucker was, according to the babysitter, Shelley Godfrey, at all times in Deputy Vernon's line of vision from the driveway.

Up to this point, the police only had probable cause to believe that Mace was guilty of having taken a vehicle without permission, driving under the influence of alcohol, driving recklessly, failing to pay a toll and attempting to elude arrest. All of these offenses are misdemeanors under Maryland law. At no time did any police officer believe that Mace was armed. Deputy Vernon in an incident report admitted that he did not know why Mace was being pursued.

Deputy Bodway, without consulting with any of the other officers, and without any officer coordinating or even discussing a plan for Mace's arrest, entered the cornfield on foot and immediately disappeared from everyone's view. Bodway approached the Bronco, drew his weapon and announced to Mace that he was under arrest. Mace then did what he had already done at least four times that evening -- he began to drive away. Bodway fired three shots from his service revolver, allegedly at the tires. More than ten minutes had transpired since Mace entered the cornfield when these shots

were fired.

Mace then drove out of the cornfield and onto the Heine driveway. To his right was Deputy Vernon, State Trooper Gruver, baby sitter Godfrey, farmer Heine and the farmhouse. To his left was Deputy Williams at the bottom of the driveway, Trimble Road, and across the road on a elevated hill, Rucker and others. Visible, and within firing range beyond Rucker, was a row of townhomes.

Mace turned left towards Trimble Road. Deputy Vernon, 90 feet away, opened fire at the vehicle and fired twelve rounds from his 9mm semi-automatic weapon. Down the driveway, Deputy Williams took cover behind his vehicle in order to protect himself from Vernon's fire. Trooper Gruver then fired one round of his shotgun directly at Mace's vehicle. Deputy Williams fired one shot directly at Mace and then as the vehicle left the driveway, he fired two more shots allegedly at the tires.

These officers shot at a fleeing misdemeanant without consideration for the fact that their fellow officers and several bystanders, including the 14 year-old babysitter, the farmer and David Rucker, were all directly within their lines-of-fire. Deputy Vernon was able to see David Rucker across Trimble Road at the time of firing. Vernon knew Rucker was in the area, having just asked him to leave the driveway.

Petitioner's ballistics expert has established that David Rucker was shot in the head with a bullet from Deputy Vernon's gun.

B. The Proceedings in this Case

District Court. On November 13, 1987, Petitioners filed this action in the United States District Court for the District of Maryland. The Second Amended Complaint alleged claims under 42 U.S.C. § 1983 for violation of David Rucker's rights under the Fourth and Fourteenth Amendments, under Articles 24 and 26 of the Maryland Declaration of Rights and pursuant to state tort law. James Rucker, as father of David Rucker, also alleged claims under Section 1983 for the deprivation of his parental rights under the Fourteenth Amendment.

The United States District Court for the District of Maryland (Marvin J. Garbis, Judge), considered this case on Motions for Summary Judgment filed and briefed as to all Counts. Granting Defendants' Motions in an oral opinion on July 20, 1990, the district court ruled that the wrongs suffered by David Rucker did not rise to the level of constitutional torts. Applying only a Fourth Amendment analysis, the district court relied upon *Brower v. County of Inyo*, 489 U.S. 593 (1989), and found that even though the officers intentionally fired their weapons at Mace and in the direction of David Rucker, since these officers did not intend to

seize Rucker, no Fourth Amendment seizure occurred, and therefore no constitutional tort was committed.

As a result, the district court granted summary judgment in favor of Defendants on all Counts on July 20, 1990.[2] Plaintiffs noted a timely appeal to the Court of Appeals for the Fourth Circuit.

Court of Appeals. The Court of Appeals for the Fourth Circuit affirmed the decision of the district court in an opinion filed October 3, 1991. The Court of Appeals held that no Fourth Amendment right is implicated where the person injured was not the person

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[2] The lower court granted summary judgment in favor of the Defendants on the Section 1983 counts on the basis described above that the wrongs committed against David Rucker did not rise to the level of constitutional torts. The court applied the same analysis to defeat the claims under the Maryland Declaration of Rights and James Rucker's parental constitutional rights claims. The court did not reach the issues concerning policy and training, and thus the Court of Appeals is incorrect when it stated that the Petitioners abandoned their claims against the County and others. Petitioners intend to pursue their claims against the County and others, as well as James Rucker's constitutional claims, once the threshold issues raised in this Petition are addressed. The court granted summary judgment on the state law counts on the ground that they were barred by the Eleventh Amendment.

intended to be seized. Following *Brower* and its own decision in *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), the Court of Appeals held that bystanders have no cognizable rights under the Fourth Amendment.

The Court of Appeals indicated that bystanders may have redress under the Due Process Clause of the Fourteenth Amendment, but only if the police action is "so reckless and irresponsible as to constitute 'inhumane' conduct 'literally shocking to the conscience'." According to the Court of Appeals, however, this condition was not satisfied as a matter of law in the present case. This petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

A.

The decision below reflects confusion in the lower courts regarding whether an innocent bystander can be seized within the meaning of the Fourth Amendment pursuant to *Brower v. County of Inyo* and creates a direct conflict with the holdings of the Fifth and Eighth Circuits.

In *Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985), the Fifth Circuit held that an innocent passenger in a automobile being pursued by the police was the victim of a

Fourth Amendment seizure when police placed a road block before the vehicle resulting in injury to the passenger. The decision below, by contrast, held that innocent bystanders can never be seized within the meaning of the Fourth Amendment irrespective of the nature of the abuse of police power involved. Sixteen year old David Rucker, struck by a stray bullet, however, is no different than the injured passenger, Jamieson. Neither Rucker nor Jamieson were the intended object of physical restraint, but both were the unfortunate victims of abusive police conduct.

The Eighth Circuit has also held that innocent bystanders may bring claims of excessive police force under the Fourth Amendment and is in conflict with the decision below. See *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989) (bystanders injured during a police chase but the court held the police actions were objectively reasonable).

The clarification of bystanders rights under the Fourth Amendment implicates several important public policy considerations. One study has shown that innocent bystanders who are struck by stray bullets from intentional police firings account for four percent of the total number of civilians struck

by the police.[3] Across the country, police who intentionally fire weapons only hit someone twenty-seven percent of the time.[4]

The purpose of the Fourth Amendment is to address "misuse of power". *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). The Fourth Circuit ignored this purpose by sanctioning the police firing at Mace, a fleeing, unarmed misdemeanant, in clear violation of *Tennessee v. Garner*, 471 U.S. 1 (1985).

Garner, supra, mandates that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Garner, supra*, at 11. "[T]here can be no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment," because "[t]he intrusiveness of

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[3] Geller, William A. and Scott, Michael S., "Deadly Force: What We Know", *Thinking About Police*, page 458, table 2 (2d ed. 1991). Extensive research by counsel has to date produced only this one report on shootings of bystanders which reflects statistics over an eleven year period in Chicago. The authors' studies establish, however, that police accuracy in shooting is consistently poor irrespective of the region within the country and their research would appear to support the proposition that the four percent Chicago figure is consistent throughout the country.

[4] *Id.*

a seizure by means of deadly force is unmatched." *Garner, supra*, at 7-9. The use of deadly force, moreover, is only justified if "it is necessary to prevent the escape of one reasonably believed to have committed a felony and the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others." *Garner, supra*, at 3 (emphasis added).

The decision below fails to address this police misconduct but rather focuses entirely on the status of the victim of the conduct. The police action in this case unquestionably involved intentional police conduct. One cannot fire twelve rounds from a semi-automatic weapon accidentally. Yet if Mace, the alleged criminal, had been struck by a bullet, the fact that a seizure had occurred for purposes of the Fourth Amendment would have been conceded. The objectively unreasonable nature of that conduct, moreover, would have defeated summary judgment.

The Court below ignores the purpose of *Garner* and *Brower* to control police misconduct. The Fourth Circuit has approved the use of deadly force to stop all drunk drivers. Following the Fourth Circuit's reasoning, moreover, would permit the outrageous result of allowing Mace to assert rights under the Fourth Amendment had he been shot, yet would deny those rights to David Rucker even if the bullet had first

passed through Mace before striking Rucker. Furthermore, such reasoning would permit the police to use automatic weapons to effect an arrest in a crowd. If ten civilians were struck but none were the "intended target" of the arrest, then no Fourth Amendment violation would have occurred.

The Fourth Circuit fails to follow the policy concerns of this Court regarding what constitutes a seizure as set forth in *Brower*:

> Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful.

Brower, supra, at 596 (citations omitted). It cannot be disputed that David Rucker's physical freedom was restrained by a police officer's wilfully fired bullet.[5] Moreover, in accordance with this Court's opinions in

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[5] In *Garner, supra*, this Court recognized that whenever an officer restrains the freedom of a person to walk away, he has seized that person. "[T]here can be no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment," because "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Garner, supra*, at 7-9.

Hill v. California, 401 U.S. 797 (1971) (police mistakenly arrested Miller, an innocent person, whom they confused with Hill, the person they intended to arrest, but Fourth Amendment right could still be asserted for this unintentional arrest) and *Maryland v. Garrison*, 480 U.S. 79 (1987) (an individual charged with a criminal violation could challenge a search on Fourth Amendment grounds even though the police did not intend to search his residence), Rucker was the unintended victim of a willful restraint through the application of deadly force.

The decision below does exactly the opposite of that required by *Brower*, *supra*, and *Graham v. Connor*, 490 U.S. 386 (1989). The ruling is based on a consideration of the subjective rather than the objective intent of the police officer in determining the rights of the victim.

In *Graham, supra*, this Court stated "that all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham, supra*, at 395 (emphasis in the original). *See also Brower, supra*, at 598 ("we do not think it practicable to conduct ... an inquiry into subjective intent"); *Graham, supra*, at 397 ("An officer's evil intentions will not make a

Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional").

Subsequent to *Brower*, however, as the Court of Appeals for the Fourth Circuit did in this case, the federal courts have incorrectly considered the subjective intention of the police in excessive force cases as to whether the police intended to "seize" the actual victim of that excessive force. *See, e.g., Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445 (10th Cir. 1990) (officer did not intend to seize passing motorist accidently struck by police vehicle); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (officer intended to strike kidnapper but not hostage with bullet; hostage found to have no Fourth Amendment remedy).

This Court granted *certiorari* in *Brower* in order to resolve a conflict between the decision of the Court of Appeals for the Ninth Circuit finding no Fourth Amendment rights in one injured by a police roadblock and the contrary decision of the Court of Appeals for the Fifth Circuit in *Jamieson, supra*. The facts of *Brower*, however, differ from those of *Jamieson* in one important respect. In *Brower* only one individual, the one sought by the police, was stopped and killed by the roadblock. This Court was thus not confronted with the question of the rights of a person who was not the intended

object of the police officers' seizure but who nonetheless was seized and injured by the officers' actions.

The question of the rights of bystanders in excessive force cases under the Fourth Amendment is a critical question which needs to be addressed by this Court in light of the lower courts' applications of *Graham* and *Brower*. By considering the subjective rather than the objective intent of the police officers in using deadly force, these decisions have misinterpreted *Graham* and *Brower* to provide rights under the Fourth Amendment to criminals but not to an innocent injured bystander. *See Popow v. City of Margate*, 476 F. Supp. 1237, 1242 (D.N.J. 1979) ("it would create an unfair anomaly to hold that the escapee who is killed by police has a cause of action for damages under Section 1983 while the innocent bystander does not").

The decision of the Court of Appeals in the present case is a compelling example of the anomalous results achieved when the question of whether a person has rights under the Fourth Amendment rises and falls upon the police officer's subjective intent. Stray bullets routinely strike innocent bystanders. It is important, therefore, that *certiorari* be granted to clarify the rights of bystanders in excessive force cases in light of *Graham* and *Brower* and to enforce *Garner*.

B.

The Court below erred by not applying the *Graham v. Connor* objective reasonableness test in an excessive force case.

Petitioners claims below were raised under both the Fourth and Fourteenth Amendments. Having rejected the claims under the Fourth Amendment, the Court below agreed with Petitioners that a bystander could have substantive due process rights under the Fourteenth Amendment.[6]

Having found that David Rucker had been deprived of his liberty under the Due Process Clause of the Fourteenth Amendment, however, the Court below then affirmed a grant of summary judgment by deciding that the facts set forth in the complaint and the record unquestionably establish that the police conduct was not "inhumane" or "oppressive " abuse of government power "literally shocking to the conscious".

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[6] The First Circuit has also decided that such rights exist. See *Landol-Rivera, supra.* Since *Graham*, however, the courts of several other circuits have ruled that bystanders have no rights to assert under the Fourteenth Amendment. *See Apodaca, supra; Roach, supra; Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989).

The ruling below ignores this Court's decision in *Graham* that:

> Today we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force - deadly or not - in the course of any arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Graham, supra, at 392.

Petitioners contend that if bystanders have no rights under the Fourth Amendment they must, where liberty has been deprived by abusive government conduct, have rights under the Fourteenth Amendment. In considering such Fourteenth Amendment rights, however, the standard to be applied is one of "objective reasonableness."

The decision of the Court of Appeals for the Fourth Circuit in this case and the decisions of the other circuits create an anomaly in that alleged criminals need only demonstrate that the police action was objectively unreasonable. By contrast, innocent bystanders are put to a much higher burden of proof, that is, whether the police

behavior "shocks the conscious".[7]

Garner prohibits the use of deadly force against a misdemeanant. The American Law Institute Model Penal Code, moreover, prohibits police officers from firing their weapons in the presence of bystanders. A.L.I. Model Penal Code, Sec. 3.09. Yet the Court below found that the police firing twenty rounds of ammunition with David Rucker present was not "shocking to the conscience". It is critical therefore that *certiorari* be granted to the clarify standard to be applied to the claims of bystanders in excessive force cases in light of this Court's decision in *Graham*.

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[7] The Third Circuit has applied a "gross negligence" standard under the Fourteenth Amendment, *Davidson v. O'Lone*, 752 F.2d 817 (3rd Cir. 1984), and the First Circuit has applied a "reckless disregard" standard, *Landol-Rivera, supra*.

CONCLUSION

For the reasons stated above, *certiorari* should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,

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December 27, 1991

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2453

JAMES H. RUCKER, *et al.*,

Appellants,

v.

HARFORD COUNTY, *et al.*,

Appellees.

Appeal from the United States District Court
for the District of Maryland
Marvin J. Garbis, District Judge
(CA-87-3048-MJG)

Argued: March 5, 1991

Decided: October 3, 1991

Before PHILLIPS and NIEMEYER, Circuit Judges, and RESTANI, Unites States Court of International Trade, sitting by designation.

Affirmed by published opinion. Judge Phillips wrote the opinion.

COUNSEL

ARGUED: Daniel M. Clements, Israelson, Salsbury, Clements & Bekman, Baltimore, Maryland, for Appellants. Carmen Mercedes Shepard, Assistant Attorney General, Baltimore, Maryland, for Appellees. ON BRIEF: Suzanne K. Farace, Israelson, Salsbury, Clements & Bekman, Baltimore, Maryland, for Appellants. J. Joseph Curran, Attorney General, Stuart M. Nathan, Assistant Attorney General, Baltimore, Maryland; Jefferson L. Blomquist, Harford County Solicitor's Office, Bel Air, Maryland; Diana G. Motz, Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland; Michael J. Travieso, Gallagher, Evelius & Jones, Baltimore, Maryland; Philip M. Andrews, Kramon & Graham, P.A., Baltimore, Maryland, for Appellees.

OPINION

PHILLIPS, Circuit Judge:

This appeal presents as its principal issue whether, and if so to what extent, the fourth amendment's prohibition of unreason-

able seizures of the person or the fourteenth amendment's due process clause provide constitutional protection to an innocent bystander against being unintentionally injured by police officers trying to apprehend a fleeing criminal suspect. It also presents the issue whether one bearing an intimate familial relationship to a person so injured has any constitutional right based upon the relationship that is thereby violated.

We conclude that the fourth amendment provides no protection to such a bystander because under the circumstances he is not being "seized" by the police officers. We further conclude that though the due process clause provides substantive protection to such a bystander against the infliction or personal injury by police conduct sufficiently outrageous to constitute completely arbitrary state action, the police conduct indisputably established on this record did not violate that substantive due process right. Finally, we conclude that if there be any constitutional right in one other than a person so injured arising from their intimate familial relationship, the one alleged here could only be derivative right which fails with failure of the primary claim.

We therefore affirm.

I.

The tragic events giving rise to this action began on July 28, 1987, when Jerry Mace, under the influence of PCP, stole a friend's Ford Bronco. From Edgewood, Maryland, he drove southbound on Interstate 95. Responding to a report that Mace was driving recklessly and had failed to pay a highway toll, a Maryland State Trooper, Officer Pearsall, set out to find and apprehend him. Having located Mace on I-95, the officer, later joined by local police officers, attempted to overtake and detain him. Mace refused to stop, speeding away wildly, weaving in and out of traffic. After running through the Maryland House rest stop, Mace drove onto a median strip. There he drove in circles and was seen dancing in his car. Eventually, he stopped on the median strip, but when Pearsall again attempted to detain him, he again sped away, this time southbound in the northbound lanes of I-95. Finally, Mace left I-95 via the northbound entrance ramp onto Route 24.

The police lost sight of Mace for a brief period until he was seen stopped at the corner of Route 152 and Hanson Road. Trooper James Gruver pulled up to him at that location and stepped out of his car, whereupon Mace drove away, barely avoiding a head-on collision. Deputy Sheriff David Alexander positioned himself up the road a

bit, near the corner of Trimble Road and Route 152, while Gruver made chase. At this point, Mace turned off the road into the Walls family's field. Gruver followed Mace onto the field, where Mace was again seen driving in circles. Mace then drove his Bronco at Gruver's car, forcing Gruver to swerve to avert a collision. Mace then drove back onto Trimble Road, where he continued for about a mile, veering, finally, over an embankment and into a cornfield on the Heine farm. Once in the cornfield, the Bronco was hidden from view.

Having heard of this automobile chase on the police radio, Deputies Stephen Bodway, Charles Hellman, Gary Vernon, and Ricky Williams all responded to assist Alexander and Gruver. Vernon, Alexander, Hellman, and Gruver positioned themselves at the corners of the cornfield, hoping to block any attempts by Mace to leave the field.

Meanwhile, David Rucker, Michael and Valerie Baublitz, and the Baublitz's three children were driving down Trimble Road in the direction of the Heine driveway. Beyond the Heine driveway, on Trimble Road, an officer blocked the road. Rucker drove into the Heine driveway and approached Deputy Vernon to ask what was going on. Vernon told Rucker to leave the scene. Rucker then drove the car with his passengers across Trimble Road, up an embankment, and into an-

other field. Mrs. Baublitz and the children remained in the car. At some point Rucker and Michael Baublitz left the vehicle.

Deputies Bodway and Conoway went into the cornfield on foot, trying to see the Bronco. Bodway disappeared into the cornfield with no means of communication. He spotted Mace in the Bronco, drew his weapon, and told Mace to freeze and leave the Bronco. Instead, Mace accelerated -- it is unclear whether he went towards Bodway -- sending dirt into Bodway's face. Bodway shot at the Bronco's tires. Mace continued toward the Heine driveway where Vernon was standing. Vernon noticed Michael Baublitz in the distance, standing beyond the driveway and he shouted for Baublitz to get out of the way. Baublitz then disappeared from sight.

Meanwhile, Mace drove right into the embankment bordering the Heine driveway. Vernon yelled for Mace to stop, but he did not. As Mace drove the vehicle down the driveway towards Trimble Road, Vernon stepped down the driveway, crouched, and fired twelve shots of his semi-automatic weapon at the Bronco's tires. Though not established as fact, it appears, and we assume for purposes of this case, that one of these shots hit Rucker, who apparently was lying on top of the embankment on the other side of Trimble Road. Vernon maintains that he was una-

ware of Rucker's presence there. A witness who was sitting in Vernon's car in the driveway later testified, however, that she could see Rucker from her vantage point. Two other officers opened fire on the Bronco, finally hitting and collapsing its tires. When Mace then fled on foot, he was captured, and at this point passes from this account.

Rucker's father, individually and as next friend of Rucker, then brought this action alleging claims against the various county police officers involved in the incident and Harford County, seeking damages for Rucker's injury. The claims in Rucker's behalf alleged, under 42 U.S.C. Sec. 1983, violations of constitutional rights secured by the fourth amendment and the due process clauses, parallel state constitutional claims under the Maryland Declaration of Rights, and state tort claims. The claims in plaintiff's individual capacity alleged under 42 U.S.C. Sec. 1983, a violation of the constitutional right "to intimate association."

The district court dismissed all claims against all defendants by summary judgment. This appeal followed.

On the appeal, appellant only challenges the dismissal by summary judgment of his Sec. 1983 claims brought in his individual

and representative capacities against the various police officers in their individual capacities, and the parallel state constitutional claims against those officers, conceding that the latter rise or fall with the former. No challenge is made to the dismissal of these claims against the County, nor to dismissal of the pendent state-law tort claims. We therefore address only the propriety of the district court's dismissal of the parallel federal and state constitutional claims, focussing on the Sec. 1983 claims as controlling.

II

The primary claim, that made in behalf of Rucker minor, was that his shooting by one of the police officers involved in the chase (presumably Vernon) violated his fourth amendment, via the fourteenth amendment, right not to be "unreasonably seized," and his fourteenth amendment right to "substantive due process."

A.

The fourth amendment claim is directly foreclosed by *Brower v. County of Inyo*, 489 U.S. 593 (1989), which held that one is "seized" within the fourth amendment's meaning only when one is the *intended object* of a physical restraint by an agent of the state. This means that a fourth amendment

seizure may occur notwithstanding that the person restrained was mistakenly thought to be another, because he nevertheless is the intended object of the specific act of physical restraint. But it does not mean, as Rucker contends, that a seizure occurs just so long as the act of restrain itself is intended (here the act of shooting) though it restrains one not intended to be restrained. *See Ansley v. Heinrich*, 925 F.2d 1339, 1344 (11th Cir. 1991) (holding that "unintended consequences of government action [cannot] form the basis for a fourth amendment violation"); *see also El Centro v. United States*, 922 F.2d 816, 822 (Fed. Cir. 1990).

It being undisputed on the summary judgment record that Rucker was not the intended object of the shooting by which he was injured, he was not thereby "seized" within contemplation of the fourth amendment. The district court therefore did not err in dismissing that claim.

B

Though the fourth amendment's specific protection against unreasonable seizures of the person does not, by definition, extend to unintentionally injured "bystanders" such as Rucker, the substantive protections of the due process clause may -- in appropriate circumstances. We recently have so held in a case of first impression in this circuit,

Temkin v. Frederick County Comm'rs, ___ F.2d ___, No. 90-1070 (4th Cir., __, 1991) (innocent "bystander" injured in high speed auto chase by police may have substantive due process claim; not established on facts of case).

Temkin held in effect that "substantive due process" guarantees embodied in the due process clause of the fourteenth amendment protect everyone subject to its general protections against being physically injured by agents of the states acting irrationally and arbitrarily, without regard to whether the injury was intended to be inflicted upon the victim. Hence, in appropriate circumstances, substantive due process protections might extend to an "innocent bystander" such as Rucker, even though the "restraint" imposed upon him by the infliction of physical injury did not constitute a fourth amendment "seizure."

But the residual protections of "substantive due process" in this (or any) context run only to state action so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("bar[s] certain government action regardless of ... proce-

dures"); *cf. id.* at 339 (procedural due process not denied where state provides adequate post-deprivation remedy). Irrationality and arbitrariness imply a most stringent standard against which state action is to be measured in assessing a substantive due process claim. In this circuit, as generally, the test where physical injury is the basis of the claim, is that the state actor's conduct must "amount to a brutal and inhumane abuse of official power literally shocking to the conscience." *Temkin*, ___ F.2d at ___.

The undisputed facts of record here reveal police conduct that does not approach such an abuse of official power. The police, including Vernon, the presumed direct actor, were legitimately about the dangerous business of apprehending a madman run amok, threatening the lives of everyone in his way. Given his obvious willingness to injure them or anyone else in order to escape arrest, as evidenced by two near-misses when officers attempted to close with him, they were justified in resorting to the force used to stop his further flight. Rucker was an unfortunate intruder into a scene of visible danger from which he was warned by the police to leave. So far as the record reveals, the police in the tense situation with which they were dealing were entitled to assume that he had left. So far as the record shows, he had time to do so before

the tragic shooting occurred. For whatever reason, he did not. It is undisputed that his shooting was purely accidental. Whether it was negligent is not before us; on a claim of constitutional violation of substantive due process it would in any event not suffice even if proven. While it is possible to think of accidental shootings by police in situations of this general type that might be so reckless and irresponsible as to constitute "inhumane" conduct "literally shocking to the conscience" (shooting into a crowd at close range, or the like), this is no such situation. The only suggestion that Vernon even had the opportunity to see that Rucker might be somewhere in or near the line of fire, was the statement of a passenger who remained in Rucker's [sic] parked car after he had left it, that from that vantage point she could see Rucker at the time he was shot. The relative locations of Vernon and this witness, the relevant topography of the area at the time, are not clear enough to refute Vernon's claim that he did not see Rucker. Even if he had, we still would conclude that given the exigencies of the situation, his accidental shooting of Rucker would not have constituted the kind of "oppressive" abuse of governmental power, *see Daniels*, 474 U.S. at 331, against which substantive due process gives protection.

Obviously, if the conduct of the assumed direct actor, Vernon, does not constitute a substantive due process violation, that of none of the others involved in the chase could.

Accordingly, the district court did not err in granting summary judgment as to Rucker's "substantive due process" claim.

III

Appellant's claim in his own behalf that the defendants' conduct in injuring his son violated appellant's separate constitutional liberty interest of "intimate association," is one of first impression in this court.

Some other courts have recognized such an independent constitutional right, variously locating it in the first amendment's guarantee of free association, see *Trujillo v. Board of County Comrs*, 768 F.2d 1186, 1189-90 (10th Cir. 1985), and in the "substantive component" of the due process clause, *see Kelson v. Springfield*, 767 F.2d 651, 654 (9th Cir. 1985); *Bell v. Milwaukee*, 746 F.2d 1205, 1245 (7th Cir. 1984).

Courts recognizing the existence of such a right also differ on its nature, hence on the way in which it can be violated. Some hold it is only violated by

state action that directly injures the relationship itself, as by the taking of a child from its parents' custody or by interfering with matters of family choice. *See Ortiz v. Burgos*, 807 F.2d 6, 7-9 (1st Cir. 1986). Others apparently hold it may be violated by any conduct which, though unrelated to the relationship, violates the constitutional right of any person in the relationship, on the theory that such conduct incidentally injures the relationship, hence the "liberty interest" in its preservation possessed by all parties to it. *See, e.g., Smith v. Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) (close relative of person killed by unconstitutional conduct of police has viable Sec. 1983 claim); *Bell v. Milwaukee*, 746 F.2d at 1245 (same).

The recognition of such a constitutional right -- on either theory -- presents issues of obvious importance and conceptual difficulty which we need not decide in this case, but can reserve for another day. We may do so because even if recognized, neither could be invoked successfully by Rucker's father on the undisputed facts of record in this case.

The police conduct here obviously was not directed at, nor did it directly impinge upon the familial relationship itself, and the claim made here could not indeed be interpreted as seeking to invoke a conduct-

directly-related-to-relationship theory.

The other theory, of incidental injury to an associational interest by conduct unrelated to it that violates the constitutional right of another, also would be unavailing here. That theory essentially gives rise to a derivative claim that is dependent upon predicate proof of the direct violation of another's constitutional right. Here that would require predicate proof of a violation of the son's constitutional right. That of course is not possible in view of our earlier rejection of that claim.

We therefore conclude that if there be any such constitutionally protectible relational interest as some courts have recognized -- an issue we reserve -- it could not be successfully invoked by claimant here.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2453
(CA-87-3048-MJG)

JAMES H. RUCKER, *et al.*,

Appellants,

v.

HARFORD COUNTY, *et al.*,

Appellees.

ORDER
[Filed Oct. 28. 1991]

The Court amends its opinion filed October 3, 1991, as follows:

On page 2, section 1 -- the status information is corrected to read "Affirmed by published opinion. Judge Phillips wrote the opinion, in which Judge Niemeyer and Judge Restani joined."

For the Court -- By Direction

/s/ John M. Graecon

CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. A. No. 87-3048-MJG

JAMES H. RUCKER, *et al.*,

Plaintiffs,

v.

HARFORD COUNTY, *et al.*,

Defendants.

July 20, 1990

Daniel M. Clements, Israelson, Salsbury, Clements & Bekman, Baltimore, Maryland and Sharon D. Bailey, Bel Air, Maryland, for Plaintiffs.

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TRANSCRIPT OF OPINION FROM THE BENCH

GARBIS, District Judge.

THE COURT: The Court has before it the Motion for Summary Judgment by the defendants. This is a matter of considerable importance, as all cases are in this Court and the parties before it. And the question of how to handle it, in terms of rendering a decision is always difficult, but I recognize that in this case the matter should be proceeding in whatever Court is proper under whatever theory is proper as quickly as possible.

It is for that reason that I am very reluctant to have this case languish any further in this Court, but rather would like to see this case, if it is going to be appealed, because I will grant Summary Judgment, appealed promptly, so that the case can be resolved in one package in the right place.

When I look at this case, I want to be very, very clear, and by no means am I saying that the plaintiffs are wrong on the merits of having the right of damages for the injuries which were sustained. I am not ruling on that, certainly one way or the other. This is not a case about whether accepting the facts as alleged by the plaintiffs, the plaintiffs are to be deprived of

recompense for injuries, that is not what this is about. I just can't make that clear enough.

The only issue in this case is whether the nature of the rights that should be vindicated, again, assuming as I must, the plaintiffs right on all the facts. What is the nature of those rights. Do we have here a Federal Constitutional claim which should be litigated in this Court, or do we have a State tort action which should end up being litigated in the State Court. Having looked at that, and also looked at a body of law which has been developed, which clearly establishes that there must be a difference between a Constitutional right, in the sense of a wrong committed that violates the constitution per se, and is recognized as the basis for a cause of action under Section 1983, as distinct from a right which doesn't arise under the Constitution of the United States, but does arise under the law, be it Federal or State, in another sense, and therefore gives a different cause of action.

And the Court has struggled with a definition to draw the line between a Constitutional tort, for lack of a better word, and an action or a tort which is not Constitutional in question. It seems to me that the line is drawn, and it is drawn in a fashion in which, one, a plaintiff in order to have a Constitutional right violation justifying

a cause of action under Section 1983, must have been the object of the action complained of, not someone who wasn't the object of the action complained of, but who for whatever reason, happened consequentially to sustain an injury which might be recognized in another type of cause of action.

I want to quote from the Brower case. I think is Brower v. the County of Inyo (phonet.), 109 Supreme Court, 1378, 1989, Justice Galia [sic]. Violation of the Fourth Amendment requires an intentional act which is a situation of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, skipping some cites, but the detention or taking itself must be willful. This is implicit in the word, seizure, which can hardly be applied to an unknowing act. The rights [sic] of assistance which are the principle [sic] grievance against which the Fourth Amendment was directed, I am skipping some citations, did not involve unintended consequences of government action, end quote.

It is true that there was intended government action, in the sense that the police officers in this case intended to shoot their weapons, but I do not believe that it is the intention at that level to which the Supreme Court is referring when it is talking about what is a Fourth Amendment viola-

tion to support a Section 1983 action. We are talking about the intention to have this plaintiff be the object of the seizure or taking. A review of all the cases that have been cited with one exception, reveals cases in which the plaintiff who has had his rights recognized, has been the object of the action that has been complained of.

Sometimes, there was a mistake of identity, nevertheless, the police were aiming their force at the person who is the plaintiff, but thinking he was someone else. Sometimes the plaintiff was an anonymous object, but nevertheless the police were directing the force, that is aim the roadblock at the next person to come down the road regardless of who it might be.

In no case other than one, which I will cite, has there ever been a recognition of a cause of action for someone who is a bystander in the sense of not being the object of the act complained of. That sole example to the contrary is the 1979 decision of the District of New Jersey in Popow, P-O-P-O-W v. Margate, which I have read, which does not -- I have great respect for, but does not seem persuasive to this Court to the extent that it contains reasoning, and obviously, did not have the benefit of considering all the cases that have been decided by the Supreme Court, since 1979. So it is for those reasons that I would hold that

there is no claim under Section 1983.

There was a discussion in the argument of the concept of standing in a criminal context, that discussion is useful in framing these issues into sense that we use the word standing in a criminal case to stand for the proposition of whether the defendant in such a circumstance is the person whose Constitutional right was violated. The word standing, the concept we use is not quite the correct concept in a civil context, because in this case, of course, the plaintiff might very well have standing to bring his lawsuit, but the fact is that I find that it is useful to consider as analogy the concept of standing in a criminal case, and when one considers that as an analogy, becomes even more clear that the Federal law does not recognize one to have a Constitutional right, or one is not the object of the seizure or the search with the force complained of.

With regard to the State negligence claim, I gather it is conceded in any event, I find that the State has sovereign immunity under the Eleventh Amendment. It expressly has not waived its immunity to be sued in the Federal Courts. It has waived its immunity to be sued in the State Courts, and therefore, I don't think there is any question about dismissing complaints against the State, which are now deemed to be against the State by virtue of the referred decision

of the Maryland Court of Appeals.

The Maryland Declaration of Rights counts are, unless something would be shown to be the contrary, essentially the same claims that are made under the Federal Constitution, the only difference between the two sets of claims would be the absence in the Maryland Declaration of Rights claim of the qualified immunity under Section 1983, and that consideration is not pertinent to this discussion.

I am not finding that the defendants are incorrect in their argument that even if there is a right, it is not a clearly established right. I don't have to reach that issue, and I am not reaching that issue at this point, however, if the case is appealed, and the Court of Appeals should be aware if they do find a Constitutional right, the question of whether or not it is clearly established is likely to have to be considered on remand, and I trust that they will consider giving appropriate guidance.

With regard to the counts of interference with parental Constitutional liberty. I don't think we need a great deal of discussion. I find persuasive the ruling of Traohio (phonet.) v. the Board of County Commissioners of Sante Fe, 768 Federal Sec., 1186, 1985 decision of the 10th Circuit, and I will quote briefly. "We conclude that an

allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under Section 1983", end of that quote. I find that persuasive. I think it is similar to what we have already talked about, but perhaps even more so. There was -- there is no way to find that the officers who shot these bullets in any way had any intention to interfere with the family relationship of the Rucker family. It is for those reasons that I would grant the Motion for Summary Judgment.

I understand that Mr. Clements will be filing a timely State action and would certainly have the option to ask the Court to stay that proceeding while he proceeds with his appeal, if -- whatever the best course of action is for the plaintiffs in order to test this finding in the 4th Circuit.

MR. BLOMQUIST: One interjection to make sure your finding then also covers dismissal or judgment in favor of the County. Because there is no constitutional right under 1983. I mean, I think that is what you are saying, but I am not sure that it is clear for the record.

THE COURT: Maybe I should ask, Mr. Blomquist. What did I miss saying?

MR. BLOMQUIST: You just didn't say anything about the County, and I wanted to make -- I just want to make sure that you are saying because he has no -- there is no Constitutional violation, there are no claims against the County, and you are granting judgment in favor of the County also. You discussed the State defendants, and you discuss the officers, and you just didn't discuss the County, and I just wanted to make that clear so that there is no question. I am sorry.

THE COURT: That is all right. I don't believe it is necessary to reach the issues relating to policy or training because of the ruling that I am making on what I would call the substantive counts, the substantive charges.

Yes, I would be dismissing the County as well.

MR. BLOMQUIST: Thank you Your Honor.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. A. No. 87-3048-MJG

JAMES H. RUCKER, *et al.*,

Plaintiffs,

v.

HARFORD COUNTY, *et al.*,

Defendants.

JUDGMENT ORDER

By separate Order issued this date, the Court has granted Motions for Summary Judgment filed by the Defendants.

Accordingly:

1. Judgment shall be, and hereby is, entered in favor of Defendants against Plaintiffs with costs.

SO ORDERED this 25th day of July, 1990.

Marvin J. Garbis
United States District Judge

Rule 56. Summary Judgment

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

Fed. R. Civ. P. 56.